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ABSTRACT

The Education Commission for the States' model state legislation for approval of postsecondary institutions and authorization to grant degrees is discussed with regard to three Supreme Court cases on academic freedom, as well as several recent state court cases on the regulation of teaching in private postsecondary institutions. Constitutional issues raised by the decision to regulate postsecondary institutions include the free speech protections of the first amendment, which includes teaching, and the freedom of religion at church related colleges. In addition, the due process requirements of the fourteenth amendment raise additional issues, including certain liberty interests from state regulatory infringement. It is suggested that states adopting a licensing requirement that focuses on teaching in postsecondary institutions should reexamine their laws in the light of general Supreme Court cases on academic freedom and the recent lower court decision in New Jersey and North Carolina. The ECS model legislation contemplates regulation of programs where the teaching is in-state, and conferral of the degree is out-of-state, along with academic standards, ethical and business practices, health and safety, and fiscal responsibility of postsecondary institutions. (SW)

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22. Regulation of Postsecondary Institutions: Model Legislation

The Issue

New, nontraditional, public and private postsecondary programs are considerably increasing the alternatives for the student population, especially in adult and vocational education. Concurrently, these programs confound the state regulatory process, which was tailored to traditional postsecondary education. States must accommodate institutions offering nontraditional education, while protecting the overall integrity of postsecondary education. Some states take a "hands off" approach; others apply consumer protection laws, such as truth-in-advertising, anti-fraud provisions, and incorporation guidelines. However, education leaders may want to regulate facilities and the quality of education offerings, and to license and accredit these institutions. In 1972, an ECS Task Force wrote Model State Legislation for Approval of Post-Secondary Educational Institutions and Authorization to Grant Degrees. Portions of the model have been used in several states. This Issuegram relates this legislation to three Supreme Court cases on academic freedom and several recent state court cases on the regulation of teaching in private postsecondary institutions.

Licensing and the First Amendment

There are several constitutional issues raised by the decision to regulate postsecondary institutions. First, the free speech protections of the first amendment include teaching. The state generally may not regulate what is said in the classroom. The Supreme Court has said: "[A]cademic freedom . . . is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . ." In this case, Keyishian v. Board of Regents of New York, the Supreme Court invalidated an attempt to remove "subversive" teachers from the classroom.

Freedom of religion raises a second set of constitutional issues. The first amendment prohibits regulation that infringes the freedom of religion. Many nontraditional, private, postsecondary institutions are religiously oriented. The Supreme Court, in Wisconsin v. Yoder, confirmed that the state interest in education may be outweighed by certain religious beliefs, where the result otherwise would be to unconstitutionally infringe those beliefs.

Licensing and Due Process

The due process requirements of the fourteenth amendment raise a third set of issues. The due process clause is generally cited for the procedural obligations it places on the state when a property right or liberty interest is infringed. However, it also substantively protects certain "liberty" interests from state regulatory infringement. The Supreme Court held in Pierce v. Society of Sisters that "liberty" includes the freedom to teach for individuals and private institutions. As applied to the right to engage in business and professional endeavors, the due process clause provides that "such liberty [cannot] be interfered with 'under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purposes within the competence of the state to effect'." Reasonableness involves a balancing of interests.

In Pierce, the United States Supreme Court invalidated a state law that required all children to attend public schools. Similarly, in Meyer v. Nebraska, the Court found invalid a statute prohibiting instruction in certain foreign languages until a child had passed 8th grade. The Court in both cases found the state regulation unreasonable and opined that the due process clause protected an individual's right to teach (and to learn) anything she pleases. However, this is not without limits: The Court said, "No question is

raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them. . . ."

While these cases focus on elementary and secondary education, they enunciate the basic tenets of academic freedom in this country. Any state regulation must be built around these minimum protections.

Recent State Cases

The traditional state regulatory role is the licensing of institutions to grant degrees. It is universally agreed that the state has an interest in controlling who grants degrees in its name. Naturally, through the degree-granting authority, states have assumed a role in insuring minimum adequacy in these education programs.

This process worked well for traditional university and college programs. However, postsecondary education has become more diversified. Programs such as correspondence courses, high technology training, vocational training, branch institutions and "diploma mills" often challenge the regulatory role of the state. For example, degree-granting authority is not desired by institutions that offer only courses in-state, leading to degrees approved in another state. Where the program offered in-state does not meet in-state requirements some states ban operation until requirements are met. Other states have found these non-degree-granting institutions completely outside the regulatory web, and allow them to operate without even minimum scrutiny.

In Nova University v. The North Carolina Board of Governors, the North Carolina Supreme Court told the board of governors that it could not prohibit Nova University, licensed in Florida, from establishing a program in North Carolina that would lead to a doctor of education degree in Florida. The court's decision was based on statutory interpretations. However, in extensive commmentary, the North Carolina Court outlined the constitutional issues raised by the state decision to regulate non-degree granting branch institutions and concluded that North Carolina could not constitutionally prohibit Nova University from teaching in-state, either.

A similar conclusion was reached by two New Jersey courts considering claims by a small Christian college that denial of degree-granting authority in one instance, and denial of the right to teach in another, unconstitutionally burdened

religion and hindered free speech. In the first case, New Jersey Board of Higher Education v. Shelton College, the New Jersey Supreme Court found that denial of the right to grant a degree or credits would not unconstitutionally burden the freedom of religion. The court concluded that the New Jersey statute "supports the state purpose of protecting students, as potential consumers of higher education, from substandard education. It allows them to assume by virtue of a school's ability to grant degrees that it meets certain minimum standards."

In the second case, New Jersey-Philadelphia Presbytery v. New Jersey State Board of Education, a federal district court found that although New Jersey could deny the right to grant degrees, it could not close the Shelton College. The court prohibited the state board of education from taking any action to prevent the college from teaching or educational activities. At the same time, the court made it clear that the state could regulate other aspects of the college: operations, such as the granting of degrees; and credits and advertising. The Third Circuit later affirmed.

The ECS Model Legislation

First, the ECS model does not distinguish between teaching and granting degrees. The definition of educational credentials expressly includes teaching:

> (i) "Educational credentials" means degrees, diplomas, certificates, transcripts, reports, documents, or letters of designation, marks, appellations, series of letters, numbers, or words which signify, purport, or are generally taken to signify enrollment, attendance, progress, or satisfactory completion of the requirements or prerequisites for education at a postsecondary educational institution. (Emphasis added.)

Second, the model legislation contemplates regulation of programs where the teaching is in-state, and conferral of the degree is out-of-state. A 1979 ECS Task Force reinforced the 1972 model by recommending:

> With the rapid growth of off-campus and out-of-state operations the conditions of authorization should be applied both to home campus or location and to off-campus and out-of-state activities of institutions. Where state authorization standards are comparable, reciprocity

> arrangements for off-campus activities may be appropriate. However, from the standpoint of the receiving state, out-of-state operations within the state should be considered as "in state" and subject to that state's authorization requirements unless specific reciprocity arrangements have been agreed upon and these conditions met.

Further, the model legislation is concerned with "establishing minimum standards concerning quality of education, ethical and business practices, health and safety, and fiscal responsibility, to protect against substandard, transient, unethical, deceptive or fraudulent institutions and practices."

As contemplated, these minimum standards do not interfere with the basic teaching function, protected by the first amendment, and would probably survive a challenge. To find otherwise may be reading too much into the first amendment. First, state licensing or approval is a prerequisite to teaching, so the censorship at issue in Keyishian is not contemplated by state regulation. Second, although the Constitution has been construed as imposing fewer first amendment restrictions on postsecondary institutions than primary and secondary schools, the court has never considered licensing, accreditation and approval to be violations of the free speech mandates of the first amendment. Third, as long as regulation is not directed to the content of speech, and as long as regulation is reasonable, it is generally upheld against a first amendment challenge.

The due process clause of the fourteenth amendment raises a more substantial question under the model legislation. The effect of the model legislation is that an institution may not operate without approval from the state agency. The touchstone of the due process balancing is that absolute prohibition of a class of programs (e.g. NO correspondence courses) will probably be unreasonable. A state interest in reducing competition with in-state institutions would be unreasonable, violating the due process clause. On the other hand, a state reporting requirement, or registration for taxation or statistical reasons would almost certainly be upheld as reasonable. There is a very substantial middle ground of state regulatory actions that must be decided on a case-by-case basis.

Policy Implications

States adopting a licensing requirement that focuses on teaching in postsecondary institutions should re-examine

their laws in the light of general Supreme Court cases on academic freedom and the recent lower court decisions in New Jersey and North Carolina. The practice of preventive law may dictate a revision of such laws to focus on advertising practices of these institutions, and on their authority to grant degrees and credits. Possibly, states may want to consider requiring such institutions to state in their advertising that the state has not approved the institution for degree-granting purposes. Such a rule protects prospective students, and does not interfere in any way with the content of the teaching to be offered.

What to Read

Jung, Steven M. A Study of State Oversight in Postsecondary Education. Palo Alto, Cal., 1977: American Institute for Research.

McLemore v. Clarksville School of Theology, 636 S.W.2d 706 (Tenn. 1982).

New Jersey Philadelphia Presbytery v. New Jersey State Board of Higher Education, 482 F. Supp. 968 (D.N.J. 1980) aff'd. 654 F.2d 868 (30 Cir. 1981).

New Jersey State Board of Higher Education v. Board of Directors of Shelton College, 48 A2d 988 (N.J. 1982).

Nova University v. The Board of Governors of the University of North Carolina, 287 S.E. 2d 872 (N.C. 1982).

State Higher Education Executive Officers. Current Status of State Licensure Regulations, A State by State Summary. Boulder, Colo, June 1981.

Task Force on Model State Legislation for Approval of Postsecondary Educational Institution and Authorization to Grant Degrees. Model State Legislation. Denver, Colo.: Education Commission of the States, 1973. $3.50.

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